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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

INTERSTATE 95 COMMITTEE, *Petitioner*

v.

JOHN A. VOLPE, Secretary of Transportation, *et al.*,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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JOHN A. VOLPE, Secretary of Transportation, *et al.*, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Interstate 95 Committee petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.[1]

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-12a) is not yet reported. The opinion of the dis-

[1] Respondents are the United States Department of Transportation, the Federal Highway Administration, the State Highway Commission of North Carolina, and the several heads of these agencies in their official capacities. The State Highway Commission supported the federal parties below.

trict court is reported at 386 F. Supp. 572 (App. C, *infra,* pp. 14a-22a).

JURISDICTION

The judgment of the court of appeals (App. B, *infra,* p. 13a) was entered on May 5, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA) expressly directs that all agencies of the federal government shall include in every recommendation or report on major federal actions significantly affecting the quality of the human environment a detailed statement "by the responsible official" on the environmental impact of the proposed action (42 U.S.C. 4332(2)(C)). This section also directs that such statement shall include the "alternatives" to such action. Still another statute, the Federal-Aid Highways Act, provides that a state's request for approval of a highway project must show the consideration given "various alternatives which were raised during the hearing, *or which were otherwise considered*" (23 U.S.C. 128(a), emphasis added).

1. Whether NEPA's express requirement of environmental impact statements "by the responsible [federal] official" is satisfied where the preparation of such statements in connection with highway projects is delegated to applicant state highway agencies subject to guidelines, review and acceptance by the responsible federal official.

This question is on all-fours with the first question raised in the pending federal government petition for

certiorari No. 74-1413, *William T. Coleman, Jr., Secretary of Transportation* v. *The Conservation Society of Southern Vermont.*

2. Whether, under the express requirements of NEPA and the Federal-Aid Highways Act that alternatives must be considered and reported, federal approval of a highway project is sustainable where the federal officials accepted the final environmental impact statement and approved the project *without notice that prior to these actions* the State Highway Commission had actively considered and documented an apparently plausible, viable intermediate route as an alternative to the two routes that were reported and from which the selection was made.

STATUTES AND REGULATIONS INVOLVED

The relevant portions of the National Environmental Policy Act of 1969, and the Federal-Aid Highways Act are set out in Appendix D, *infra,* pp. 23a-24a.

STATEMENT

The Federal-Aid Highways Act provides for a national system of interstate highways, with 90 percent of the cost to be borne by the federal government. While the states select, design and construct the highways, the commitment of federal funds is dependent on prior approval of each project by the Department of Transportation. Involved here is the largely completed I-95 which stretches from Maine to Florida and leads to many well known summer and winter resorts. I-95 has for some time been completed to the north and south approaches to Fayetteville, North Carolina. There, it links up at each end with four-laned U.S. Highway 301 which has long served as the principal

artery of travel to, from and beyond Fayetteville. Through the years a large number of tourist-oriented businesses, comprising the second largest industry in Fayetteville, grew up around U.S. Highway 301. The battle lines formed over the question of whether I-95 should be completed through the city by upgrading U.S. Highway 301 to interstate road standards, or should bypass the city altogether. The petitioner, Interstate 95 Committee, is an association of some eighty businessmen whose establishments cater to the tourist trade. These businessmen banded together to oppose bypassing the city which they believed would destroy their investments, cause serious unemployment, endanger the city's vital tax base, and increase city sprawl.

Petitioner's view did not prevail at the administrative level, as on two separate occasions the state recommended, and the Department of Transportation approved, a by-pass route some five miles outside Fayetteville's limits. The first time, after the district court gave summary judgment for the Department of Transportation, the Fourth Circuit Court of Appeals remanded the case for lack of an environmental impact statement and a public hearing on the social and environmental consequences of the proposed action (463 F.2d 402). While the district court held the case, the State Highway Commission busied itself with the preparation of environmental statements pursuant to federal Policy and Procedure Memorandum (PPM) 90-1 (37 Fed. Reg. 21809-21816). PPM 90-1 was issued by the Department of Transportation to carry out, in what it considered a legitimate and feasible way, NEPA's requirement of environmental statements "by the responsible [federal] official" (42

U.S.C. 4332(2)(C), App. D, *infra,* p. 23a). While delegating the task of actual preparation of the statements to applicant state highway officials, the regulation sets out guidelines for incorporating the relevant environmental considerations and provides for consultation with federal highway officials. The regulation calls for, first, the preparation by the state of a draft statement which is to be widely circulated for comment and review by federal highway officials. This is to be followed by a revision (again by the state) of the draft statement in light of the comments and reviews into a final statement. This final statement has to be submitted to the Department of Transportation for its acceptance. The State Highway Commission here prepared and circulated a draft statement pursuant to the regulation, held the required public hearing on July 16, 1973, and thereafter prepared a final statement which was accepted by the Department of Transportation on September 17, 1973. Then on October 5, 1973, the state again requested federal approval of the by-pass route pursuant to the provisions of the Federal-Aid Highways Act (23 U.S.C. 128(a), App. D, *infra,* p. 24a). The approval was granted on October 24, 1973. Thereafter, the district court gave summary judgment for the Department of Transportation and the court of appeals affirmed.

Before turning to a summary of those decisions, we adduce the following additional facts which form the basis for the second question here presented in respect to the provisions of both NEPA and the Federal-Aid Highways Act that *alternatives* to recommended actions must be considered and reported (42 U.S.C. 4332(2)(C)(iii); 23 U.S.C. 128(a), App. D, *infra,* pp.

23a-24a). Just as it had done prior to remand, the State Highway Commission (at the public hearing, in its prepared environmental statements and in its request for approval of the by-pass) considered only the same two routes—the by-pass and U.S. Highway 301. *Unbeknown* to the Department of Transportation when it accepted the final environmental statement on September 17, 1973, or when it finally approved the by-pass on October 24, 1973, was the fact that the State Highway Commission had considered an apparently plausible, viable in-between route which was proposed to save Fayetteville's tourist industry and eliminate the dangers of sprawl. The consideration of this intermediate route was evidenced by an internal memorandum of the State Highway Commission which analyzed in considerable detail its advantages and disadvantages *vis a vis* the other two routes and recommended against it (App. E, *infra,* pp. 25a-29a). This detailed memorandum, while dated September 21, 1973, indicates in the first paragraph that the proposal was before the state certainly as early as September 5, 1973. Our offer of proof that the proposal was submitted even *before* the hearing on July 16, 1973, was not allowed (App. C, *infra,* p. 20a, n. 4).

1. The district court rejected our contention that allowing the State Highway Commission to prepare the environmental statement was an impermissible delegation of a federal responsibility expressly decreed in NEPA (42 U.S.C. 4332(2)(C), App. D, *infra,* p. 23a). While acknowledging that our position was supported by decisions in the Second Circuit, the court nevertheless preferred the view expressed in other circuits that where, as it found here, a state agency prepares the statement pursuant to federal guidelines and federal participation is evidenced by consultation and

good faith review and acceptance of the statement, the delegation is permissible (App. C, *infra,* pp. 17a-18a).[2] In a more elaborate opinion, citing its own previous decision as well as similar appellate decisions in the eighth, ninth and tenth circuits, the court of appeals affirmed the district court's ruling and its rationale (App. A, *infra,* pp. 5a-9a).

2. On the issue of the state's failure to disclose its consideration of the proposed intermediate route and the federal approval of the by-pass in ignorance of such a proposal, the district court saw no violation of either NEPA or the Federal-Aid Highways Act. It held that the requirements of both of these statutes as to consideration and reporting of alternatives were alike subject to a construction of reasonableness and that looking at the state's analysis of the intermediate route proposal, *regardless of when it was first received and considered,* the reporting of it either in the environmental statement or the request for approval of the by-pass "could in no way have altered the conclusion" (App. C, *infra,* pp. 20a). The court of appeals affirmed on essentially the same grounds, likewise basing its assessment of the reasonableness of the proposal entirely on the analysis and conclusions contained in the state's memorandum (App. A, *infra,* pp. 9a-12a).

REASONS FOR GRANTING CERTIORARI

NEPA is a major statute applicable not only to the Department of Transportation with its heavy involve-

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[2] Additionally, we unsuccessfully contended in both courts below that federal review and acceptance here were hardly more than a rubber-stamp operation. We realize that such a factual issue is not a good candidate for certiorari and therefore do not raise it here.

ment in highway construction projects, but to every federal agency whose actions have a significant effect upon the environment (App. D, *infra,* p. 23a). Thus, NEPA is not the exclusive statute of a single agency whose construction and implementation would normally be accorded due respect by the courts, but is rather a piece of legislation whose essential provisions call for construction befitting its wide coverage and broad perspective.

At the base of NEPA stands the express requirement of an environmental impact statement "by the responsible [federal] official." Of obvious critical importance is the question whether this requirement means that the responsible federal agencies *must actually prepare* the statement and cannot delegate preparation to applicants who seek federal subsidies and approval of projects, even though the delegation is subject to guidelines, review and acceptance of the statement. Specifically, here, the question is whether such a delegation is permissible to states seeking approval of highway construction projects. This important question presses for resolution by this Court because of an irreconcilable conflict among the circuits. As previously noted, there is a pending petition for certiorari by the federal government on precisely the same question (No. 74-1413, *William T. Coleman, Jr., Secretary of Transportation* v. *The Conservation Society of Southern Vermont*). We, of course, are on the opposite side of the fence as to how this question should be resolved on the merits.[3]

[3] There is pending legislation in Congress aimed at resolving this issue. We will advise the Court of any outcome that might affect this petition.

1. The Courts of Appeal in Five Circuits Permit Delegations While in Two Circuits They Are Against.

In addition to the instant case, the courts of appeals in four other circuits have approved delegation of the task of preparing environmental statements for highway construction projects to state agencies where the preparation was done under federal guidelines and federal participation was evidenced by consultation, review and acceptance of the statement. *Iowa Citizens for Environmental Quality, Inc.* v. *Volpe,* 487 F.2d 849 (8th Cir.); *Citizens Environmental Council* v. *Volpe,* 484 F.2d 870 (10th Cir.); *Finish Allatoona's Interstate Right, Inc.* v. *Brinegar,* 484 F.2d 638 (5th Cir.); *Life of the Land* v. *Brinegar,* 485 F.2d 460 (9th Cir.).

The decisions of the courts of appeals in the second and seventh circuits, however, stand in clear and firm disagreement with that view. In *Conservation Society of Southern Vermont, Inc.* v. *Secretary of Transportation,* 508 F.2d 927, 931-33 (2nd Cir.),[4] the court adopted the stringent rule that the responsible federal official had a *nondelegable duty to prepare* the environmental statement, and that this meant that while he need not ignore previous work by the state authorities, the primary responsibility for research and writing was his alone. The court believed that this "unambiguous rule" best fits the express language and purpose of NEPA and has the advantage of rendering unnecessary the substantial amount of litigation raging over the adequacy of federal participation and charges of state bias. The court of appeals for the seventh circuit has adopted the very same stringent rule and rationale

[4] See also, *Greene County Planning Board* v. *F.P.C.,* 455 F. 2d 412 (2nd Cir.); *Steubing* v. *Brinegar,* 511 F. 2d 489, 496 (2nd Cir.); *I-291 Why? Association* v. *Burnt,* 2d Cir., No. 478, decided May 30, 1975, affirming 372 F.Supp. 223.

(*Swain* v. *Brinegar,* No. 74-1625, decided April 29, 1975; 7 ERC 2046, 2052-54).[5]

We submit that although in the minority, the position of the second and seventh circuits is the correct one. None of the majority decisions denies that NEPA's requirement of an environmental impact statement is addressed to, and is the responsibility of, federal officials. They fail to make clear, however, just how they get from there to a permissible delgation to state agencies of the responsibility to *prepare* the statement. What might be a fair articulation of the majority's position is found on p. 14 of the federal government's pending petition for certiorari on this issue (No. 74-1413). It is there argued that, "Issuance of an adequate statement is a federal responsibility but it, like many other responsibilities ultimately resting with particular officials, can be assigned in the first instance to others more intimately acquainted with the project and more advantageously placed to collect and assess the requisite information."

We believe that *Swain* v. *Brinegar, supra,* effectively refutes the argument that NEPA merely requires the responsible federal official to *provide* rather than *prepare* the statement. The court there points out that after requiring "a detailed statement by the responsible official," NEPA goes on to say that "prior to making any detailed statement, the responsible Federal official shall consult . . . and obtain . . . comments. . . ." Thus, the court concludes, "Clearly the act contemplates the EIS being prepared by the

[5] The opinion in this case is reproduced in Appendix E, pp. 83a-115a, of the federal government's pending petition for certiorari, No. 74-1413.

federal official in the first instance," and no administrative interpretation or regulation to the contrary can be allowed to prevail (7 ERC 2053, N. 14). As to the argument that state authorities are "more advantageously placed to collect and assess the requisite information," we suggest that it is quite a superficial view. On the contrary, as the court in *Swain* v. *Brinegar* sees it, "State agencies quite properly look first to the interests of their own state; this is inherent in the design of a federal union. And such agencies are subject to political pressures which can often make detached evaluation of their own projects quite difficult. The result is that state drafted impact statements may slight or completely ignore essential national concerns, and these deficiencies may successfully be masked by use of general, nonspecific language within the EIS itself." (7 ERC 2054). We would add that even if we eliminate the thought of politics or narrowness or bad faith on the part of state authorities, review of an environmental statement, whose preparation requires so much detailed and sophisticated research and balanced assessments, can never serve as a substitute for preparation. And if one believes, as we think he must, that the language and thrust of NEPA demand truly meaningful and effective involvement of the federal government, the delegation question requires an answer in the negative.

2. The Application of the "Rule of Reasonableness" to the Related Issue of the State's Failure To Report Its Consideration of the Intermediate Route Constitutes an Unwarranted Extension of that Rule and Is Not in Accord with Decisions in Other Circuits.

The holding below letting stand the approval of the by-pass in absence of notice to federal authorities that the state had considered a third alternative route also warrants review. The facts pertinent to this issue are stated on p. 5 hereof. The state's memorandum showing a detailed consideration of the intermediate route is reproduced in App. E, *infra,* pp. 25a-29a. NEPA expressly requires that the environmental statement contain a consideration of *alternatives* to any proposed action (42 U.S.C. 4332(2)(C)(iii), App. D, *infra,* p. 23a). This requirement has been called "the linchpin of the entire statement."[6] Lending further weight to the importance of consideration of alternatives is still another major statute, the Federal-Aid Highways Act, which likewise requires that alternatives be considered and reported in a state's request for approval if a highway project (23 U.S.C. 128(a), App. D, *infra,* p. 24a). Yet in the face of these clear and stringent statutory requirements the state did not report, either in the environmental statement, or in its request for approval, that it had considered a third alternative route. And without any knowledge of that fact, the Deparment of Transportation proceeded to accept the environmental statement and subsequently approved the by-pass route.

Both the district court and the court of appeals applied the "rule of reasonableness" to decide the issue. The district court quoted from *Life of the Land* v. *Brinegar,* 485 F.2d 460, 472, that "there is no need for an EIS to consider an alternative whose effect cannot be reasonably acertained, and whose implementation is deemed remote and speculative" (App. C, *infra,* p. 20a). The court of appeals quoted from *Movement Against Destruction* v. *Volpe,* 361 F. Supp. 1360, 1388, that NEPA only demands "realistic alternatives that will be reasonably available within the time the decision making official intends to act" (App. A, *infra,* p. 11a). Nowhere, however, does either court proceed to show just what was unrealistic, remote, speculative, or untimely about the alternative proposal here. On the contrary, by the state's own analysis the proposed intermediate route was more "realistic" than U.S. Route 301 which lost out to the by-pass after extensive consideration in the environmental statement, as it was shown to have six advantages and only two disadvantages *vis a vis* U.S. Route 301. Or to put it another way, if the proposed intermediate route had from the beginning been the only rival of the by-pass, it surely could not have been left out of consideration in the environmental statement. As for timeliness, our offer of proof that the intermediate route proposal was submitted to the state even *before* the public hearing on July 16, 1973, was not allowed, the district court holding that in the view it was taking of the matter, the time was of no importance (App. C, *infra,* p. 20a, note 4). The court of appeals indulged in "a fair assumption" that the proposal was received "in the first few days in September [1973]" (App. A, *infra,* p. 10a). Even if this "fair assumption" is accepted, it would make it about two weeks *before* the environmental statement was accepted on September 17, about four weeks *before* the state submitted its request for

[6] *Monroe County Conservation Council* v. *Volpe,* 472 F. 2d 693, 697-8 (2nd Cir. 1972).

approval of the by-pass on October 5, and about seven weeks *before* the approval of the by-pass on October 24. And if our offer of proof had been granted, the time of the submission of the proposal might have been established as even *before* the final environmental statement was in the process of preparation by the state. In either circumstance, there was time enough to notify the federal government before it committed itself. Indeed, compliance with NEPA demands "that environmental issues be considered at every important stage in the decision making process concerning a particular action—at every stage where an overall balancing of environmental and nonenvironmental factors is appropriate and where alterations might be made in the proposed action to minimize environmental costs." *Calvert Cliffs' Coordinating Committee* v. *A.E.C.*, 449 F.2d 1109, 1118 (D.C. Cir. 1971).

We submit that there has here been an unwarranted extension of the "rule of reasonableness," in that it appears not to have been applied to the realism or timeliness of the proposed alternative but to the likelihood of its approval by the Secretary of Transportation. First, the state apparently decided that the Secretary of Transportation would not go for the suggested intermediate route and therefore did not report it, and then the court of appeals decided that "it was quite within the bounds of reason for the suggestion not to be reported to the federal highway authorities" (App. A, *infra,* p. 12a). Thus, the Secretary of Transportation was deprived of his need and right to know under both NEPA and the Federal-Aid Highways Act. What the Secretary *might* decide is not for a state, or normally for a court, to decide. The province of a court is to review for arbitrariness or unlawfulness whatever decision the Secretary actually makes. *Sierra Club* v. *Morton,* ——— F.2d —— (D.C. Cir. 1975), 7 ERC 1977, 1990, N. 29. As the district court put it in a similar situation in *I-291 Why Association* v. *Burns,* 372 F. Supp. 223, 252-3; aff'd. 2nd Cir. No. 478, May 30, 1975:

> "Rather than inform federal decision makers, by objectively listing the alternatives facing them regarding I-291 and supplying facts sufficient for them to judge the merits of each alternative, the EIS usurps the Secretary's decision making role by framing its discussions of alternatives so that, based on the EIS alone, only one decision is possible—to proceed with I-291 as presently planned. Thus the EIS caters to just the sort of tendentious decision making that NEPA seeks to avoid."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1530

FAYETTEVILLE AREA CHAMBER OF COMMERCE, *Plaintiff*
INTERSTATE 95 COMMITTEE, *Appellant*

v.

JOHN A. VOLPE, individually and as Secretary of Transportation; F. C. TURNER, individually and as Federal Highway Administrator; and RALPH R. BARTELSMEYER, individually and as Director of Public Roads; and STATE HIGHWAY COMMISSION, *Appellees*

Appeal from the United States District Court for the Eastern District of North Carolina, at Fayetteville. F. T. Dupree, District Judge.

Argued December 5, 1974 Decided May 5, 1975

Before BOREMAN, Senior Circuit Judge, FIELD and WIDENER, Circuit Judges

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WIDENER, Circuit Judge:

This case comes to us after remand in 463 F.2d 402 (4th Cir. 1972).[1]

When the matter was first here, we partially affirmed and remanded for further consideration and such proceedings as might be necessary with respect to two specific facets of the case: (1) the filing of an environmental impact statement (EIS) under the National Environmental Policy Act of 1969 (NEPA), 42 USC § 4332(2)(C), and (2) compliance with a part of the Federal-Aid Highways Act, 23 USC § 128(a). NEPA was enacted after this highway project was well along, and, in the first appeal of this case, it was conceded that an environmental impact statement should have been prepared and circulated in conjunction with the approval of the bypass routing. Also, after the project had commenced and public hearings had been held, 23 USC § 128(a) was amended.[2] As initially applied to this bypass, § 128(a) required public hearings and consideration of the economic effects of the location of the bypass. As amended in 1968, additional information to be sought at such hearings is that to aid in the required certification indicating the consideration of the social effects of the proposed location, its impact on the environment, and its consistency with the particular community's urban planning and goals. A 1970 amendment provided for report

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[1] We note we have received an unsolicited *ex parte* communication giving the results of what was apparently a local poll on the location of the bypass. Of course it was not considered in arriving at our decision.

[2] We held in *Arlington Coalition on Transportation* v. *Volpe*, 458 F2d 1323 (4th Cir. 1972), that 42 USC 4332(C) and 23 USC § 128(a) as amended in 1968 might apply to ongoing highway projects. The provision providing for a report on the consideration given alternatives is not a part of the 1968 amendment to § 128(a), but is § 135(a) of PL 91-605 of the Federal Aid Highway Act of 1970, the 1970 amendment to § 128(a).

of various alternatives raised during the hearing or which were otherwise considered as well as other matters.

The plaintiffs-appellants contend that the preparation of environmental impact statements is a non-delegable duty which must be performed solely by a responsible federal agency and, assuming such is not the case, participation in the preparation of the EIS by the North Carolina Transportation Department is impermissible because the head of the department was committed to the bypass location; that the approval of the final EIS by the U. S. Department of Transportation was not based on substantial good faith review; that an alternate route did not receive proper consideration; and that their request for an evidentiary hearing should have been granted in order to prove the decision of the U. S. Department of Transportation on the bypass route was arbitrary and not in accordance with law. We do not accept these contentions and affirm.

A more detailed statement of the background of the case is made in our first opinion, 463 F.2d 402. Following remand, the district court, by a series of orders commencing on August 20, 1972, properly insured that the remand was complied with.

A draft EIS had been commenced prior to the remand, the appropriate state and federal authorities co-operating in its preparation. The first draft was dated December 29, 1971, and was cleared for circulation January 3, 1972. Following the orders of the district court, a revised draft impact statement was prepared and cleared for circulation in May 1973. It was filed with the district court May 15, 1973 and was available at the public hearing subsequently referred to.

After the revised draft environmental impact statement had been circulated and filed with the district court, and after due public notice, a public hearing was held on July 16, 1973. This was a combined design and location hearing.

At this hearing, everyone interested was given the opportunity to present his views concerning the design and location of the bypass and also the environmental and other effects. Included among the witnesses at the public hearing were two experts offered by the plaintiffs who gave evidence concerning environmental and economic aspects of "the highway project in question." The hearing was attended not only by responsible officials of the State Highway Department but also by the division engineer and area engineer of the Federal Highway Administration and its regional attorney. At the hearing, a full airing of the bypass route and two alternate routes following U. S. 301 was had.[3]

Following the public hearing, opportunity was given to supplement the record, and the plaintiffs availed themselves of this opportunity.

The State Highway Department completed its work on the final EIS and submitted it to the Federal Highway Administration on August 24, 1973, and on that date the division office of the Federal Highway Administration submitted the statement to its regional office. The regional office accepted the statement on August 27, 1973 and forwarded it to its Washington office, where the final statement was accepted on August 30, 1973 and transmitted to the Department of Transportation. The Department of Transportation accepted the final statement on September 17, 1973 and transmitted it to the Council on Environmental Quality on that date. The required 30-day waiting period having expired, the bypass location, on request, was approved by the Department of Transportation on October 20, 1973.

The district judge had before him the entire administrative record when he considered the defendants' motion for summary judgment. The action of the district judge in re-

[3] The record also shows the federal and state authorities considered two variations of each of the two U.S. 301 alternate routes. So, in fact, at least six alternatives were considered, including a "do nothing" alternative.

quiring the full record was in accordance with the decision in *Citizens to Preserve Overton Park* v. *Volpe,* 401 US 402 (1971), "that review is to be based on the full administrative record that was before the Secretary at the time he made his decision." 401 US 402, 420. In a memorandum decision, the district court correctly stated the standard of review as follows:

> "... the court has made a 'thorough, probing, in-depth review' of the additions made to the administrative record submitted by the defendants subsequent to remand as required by *Overton Park,* supra; it has reviewed the agency decisions on the merits to determine if they are in accord with NEPA as required by *Conservation Council of North Carolina* v. *Froehlke,* 473 F.2d 664 (4th Cir. 1973), and *Appalachian Power Company, et al* v. *Environmental Protection Agency,* 477 F.2d 495 (4th Cir. 1973); and has undertaken to determine if the Secretary of Transportation inadequately explained his decision, all with the view to determining whether the decision was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'. *Camp* v. *Pitts,* 411 US 138, 142 (1973)." (footnote 1 omitted)

At this point, we note that in *Camp* v. *Pitts,* 411 US 138 (1973), the court has stated that in applying the standard of review set out in 5 USC § 706(2)(A) "... the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." 411 US 138, 142 (1973).

The claim that the federal and state cooperation in the preparation of the environmental impact statement was an impermissible delegation of authority on the part of the Federal Highway Administration is not well taken. The statute, 42 USC 4332(C), requires "a detailed statement by the responsible official." Even before the decision of this

court in *Arlington Coalition on Transportation* (it being remembered that NEPA was enacted subsequent to the initial public hearings in this matter), the responsible federal officials, in conjunction with the state officials, had commenced the preparation of a draft impact statement, and the continued cooperation, commencing in 1971, of state and federal authorities in the preparation of the first and second draft environmental impact statements and the final statement is supported by the record. Not only did the federal officials review with care from time to time the work on the preparation of the statement, the physical preparation of which was largely handled by the state authorities, the record also includes such activity by the federal officials as field inspections, erosion control recommendations, directions to the state to include appropriate consideration of the comments from the Council on Environmental Quality, joint meetings to determine the design concept, and progress meetings to review the draft statement. And we do not mention here most of the matters of detail which the record shows were jointly considered by the state and federal authorities in deciding upon the location and design of the Fayetteville bypass, as well as the preparation of the environmental impact statement.

While it is true that it has been held that if the EIS were only "reviewed as to form" by the responsible federal agency, see *Greene County Planning Board* v. *Federal Power Commission,* 455 F.2d 412 (2nd Cir. 1973), the preparation of the report in its entirety by a delegate of the federal agency might fatally infect the agency action complained of, such question is not before us.[4] The district judge found good faith participation by responsible federal

[4] Some language in *Iowa Citizens for Environmental Quality* indicates that if the question in *Greene County* were squarely put, the decision of the court might not be the same as the Second Circuit. See esp. p. 854-5 and n. 3. We note this to emphasize we express no opinion on the question of delegation on the facts of the *Greene County* case.

officials in the preparation of the two draft environmental statements and the final EIS, and our examination of the record confirms his finding. The record discloses a joint participation by federal and state officials in the bypass project and in the preparation of both draft statements and the final EIS, even to matters of such nice minor detail as the location of graves. Two circuits at least have considered this question with respect to the Federal-Aid Highways Act and compliance with it under Department of Transportation Policy and Procedure Memorandum 90-1, 23 CFR, Part I, Appendix A, and found environmental impact statements for the location of federal-aid highways sufficient when prepared under like circumstances. In *Iowa Citizens for Environmental Quality, Inc.* v. *Volpe,* 487 F.2d 849 (8th Cir. 1973) (one judge dissenting), with a fact situation very nearly identical to that existing here, the court approved an EIS by the Iowa highway department prepared under Memorandum 90-1 as above mentioned. On similar facts, in *Citizens Environmental Council* v. *Volpe,* 484 F.2d 870 (10th Cir. 1973), a unanimous court approved an EIS where the "Secretary of Transportation did not simply 'rubber stamp' the State's work. He reviewed it and adopted it as its own." In *Life of the Land* v. *Brinegar,* 485 F.2d 460 (9th Cir. 1973), the court approved an EIS physically prepared by a private consulting firm at the instance of the Federal Aviation Agency, when ". . . agency officials actively participated in all phases of the EIS preparation process." 485 F.2d 460, 467. And, in our circuit, the District of Maryland, in *Movement Against Destruction* v. *Volpe,* 361 F.Supp. 1360 (D. Md. 1973), aff'd. per curiam, No. 73-2136 (4th Cir. 1974), approved an environmental impact statement against the argument that it should not have been drafted by the Interstate Division of Baltimore City, a division of the State Highway Administration of Maryland. The court there found that responsible federal authorities had participated in the preparation of the statement through the federal district engineer and had monitored the development of plans for an expressway for three

years. Parenthetically, we note that the Federal Highway Administration has been involved in almost every aspect of the Fayetteville bypass since at least 1964.

The allied complaint, that, if there is no impermissible delegation, the participation in and physical preparation of the EIS by the North Carolina authorities is none the less not allowable, is likewise not well taken. It is well to note here that the bypass location for the road had been fixed after public hearings even before the passage of NEPA, much less the amendments of 23 USC § 128(a) in 1968 and 1970. Someone has to approve the route of every highway. In the case of federal-aid highways, the initial decision is made by the responsible state authorities subject to approval by the federal authorities. This is precisely what was done in this case. The fact that a state highway official has made an administrative decision as to the location of a federal-aid highway does not disqualify his department from taking part in the preparation of an environmental impact statement. In the face of similar objections, the Ninth Circuit, in *Life of the Land,* and the Eighth Circuit, in *Environmental Defense Fund* v. *Corps. of Engineers, U. S. Army,* 470 F.2d 289 (8th Cir. 1972), have indicated that test of compliance with § 102 of NEPA, 42 USC § 4332, "is one of good faith objectivity rather than subjective impartiality." 470 F.2d 289, 296. We adopt this reasoning.

Nothing in the record suggests other than good faith objectivity on the part of any official, state or federal. The fact that they have come to different conclusions than the plaintiffs desire is no reason to upset their decision.

We are thus of opinion that where responsible federal and state officials participate in the preparation of an environmental impact statement for a federal-aid highway, the statement being prepared in accordance with the applicable statutes and regulations as in the case here, there has been no violation of 42 USC § 4332(C) because of participation by the state officials.

The contention that the approval by the Department of Transportation of the final EIS was not based on substantial good faith review has been largely covered in the discussion just above. Suffice it to say here that when the federal officials have actively participated in the preparation of the statement, it is hardly possible to claim they have not reviewed it. In all events, the record supports a detailed review as well as participation. If the claim may be taken to mean any lack of good faith, the record is simply devoid of the slightest evidence to support it.

The next claim of the plaintiffs is that a third alternative route was considered by the State Highway Department and not submitted to the federal authorities. They say that this violates 42 USC § 4332(C)(iii) and also 23 USC § 128(b) [5] Section 4332(C)(iii) provides that a statement on alternatives to the proposed action be included in the EIS. Section 128(a) provides that the state should report to the federal authorities various alternatives which were raise dduring the public hearing or which were otherwise considered.

Some time after the public hearing of July 16, 1973, a person described by the appellants as a respected, technically qualified, and long-time resident of Fayetteville submitted to the State Highway Department an alternate route to either the bypass or the U. S. 301 location. At this point, it should be remarked that the routes considered at the public hearing were the bypass which was ultimately approved, two U. S. 301 routes, and a "do nothing" alternative, which would mean not building the road at all.[6] See PPM 90-1, App. 3, para. 2(d). The proposed intermediate location would have gone between the bypass route, which went as far as five miles from the city, and the U. S. 301

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[5] 42 USC § 4332(D) also concerns alternatives.

Actually, 23 USC § 128(a) requires the report on the consideration of alternatives. Section 128(b) requires a copy of the transcript of the public hearing to be submitted to the Secretary.

[6] See footnote 3, p. 6.

route. Exactly when this proposal was made by the citizen to the State Highway Department is not shown by the record. It was discussed in an internal memorandum within the State Highway Department dated September 21, 1973, which refers to an aerial mosaic submitted September 5, 1973, which is the first date in the record referring to the intermediate route. So, a fair assumption is the suggestion was made to the State Highway Department during the first few days in September. In all events, we know that the citizen, although a resident of Fayetteville, did not bring the matter up in the public hearing on July 16, 1973, when the very subject of his suggestion was being publicly discussed at a meeting called for that purpose. The State Highway Department did as it should have done and examined the suggestion on its merits. It concluded, in the internal memorandum, as compared with the bypass route, the intermediate route had one advantage as against 13 disadvantages and recommended that it not be given further consideration. In addition to the enumerated disadvantages, the intermediate suggestion would have meant a delay of about four more years in a project which at that time had already suffered delays from the public hearings of 1966 until 1973.

No cases are found construing the provision for the consideration of alternatives in 23 USC § 128(a). Section 4332(C)(iii), in its provision for alternatives, has been considered in *Life of the Land, Iowa Citizens for Environmental Quality,* and *Natural Resources Defense Council* v. *Morton,* 458 F.2d 827 (D.C. Cir. 1972), and *Environmental Defense Fund* v. *Corps of Engineer, U. S. Army.* Sometimes the review has been phrased as going to subsection (D) of the statute rather than (C)(iii), but always construing the provisions as to alternatives. In this circuit, *Movement Against Destruction* has considered the same matter. All these cases construe the provisions for consideration and discussion of alternatives as subject to a construction of reasonableness. We see no reason the similar provisions of § 128(a) should not be construed the same, and we so construe them. The gist of all of the opinions is that an infinite variety of alternatives is permissible in almost every administrative decision of this nature, which should be especially true here when it is considered that the administrative authorities have considered a "do nothing" alternative. This being so, there must be an end to the process somewhere or no federal-aid highway would ever be built. So long as there are unexplored and undiscussed alternatives that inventive minds can suggest, without a rule of reason, it will be technically impossible to prepare a literally correct environmental impact statement and literally impossible for a state highway department to report, in compliance with § 128(a), the final decision on the route of a federal highway to the federal authorities. We think that what NEPA, 42 USC § 4332(C)(iii), demands is the "study, development, and description of reasonable alternatives," *Environmental Defense Fund* v. *Corps of Engineers, U. S. Army,* at p. 297, that is to say, "realistic alternatives that will be reasonably available within the time the decision making official intends to act." *Movement Against Destruction,* at p. 1388. We think the language from *Natural Resources Defense Council,* approved in *Iowa Citizens for Environmental Quality,* should be applicable here to the alternative provisions of § 128(a) and § 4332(C)(iii) alike: "... if this requirement is not rubber, neither is it iron. The statute must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible, given the obvious, that the resources of energy and research—and time—available to meet the Nation's needs are not infinite." 487 F.2d 849, 852. If the state highway authorities in this case had summarily rejected the suggestion for the intermediate route made by the citizen who did not bring up his suggestion at the public hearing, it might very well be accused of being arbitrary. And, having considered the suggestion, and concluded that its numerous disadvantages as weighed against its one advantage over the route chosen, coupled with a four-year time delay in an

already delayed project, caused it not to warrant further consideration, it was quite within the bounds of reason for the suggestion not to be reported to the federal highway authorities under § 128(a) and not to be discussed in the final draft of the EIS (even if it were received by the state authorities in time to do so, which is doubtful).

Plaintiffs' request for an oral hearing, which was denied by the district court, is also without merit. The district court had before it the full administrative record. The record discloses the factors which were considered by the Department of Transportation in the approval of the route and in the submission of the environmental impact statement. All of the matters requiring consideration by 42 USC § 4332(C) were considered by the Secretary. The only concrete argument the plaintiffs make for granting an oral hearing is that the Secretary has not agreed with the conclusions reached by their expert witnesses. The most that can be said for their position is that the federal authorities did not agree with the conclusions reached by the plaintiffs' witnesses. No reason is given to justify departure from the standard laid down in *Camp* v. *Pitts* that ". . . the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." No fact is called to our attention to show the Secretary did not "act within the scope of his authority" or that his action was not "justifiable under the applicable standard." *Citizens to Preserve Overton Park,* p. 420.

All in all, we are of opinion the actions of the Secretary with respect to the location of the Fayetteville bypass were neither arbitrary nor capricious nor an abuse of discretion, nor otherwise not in accordance with law; rather, they were studied, deliberate, well within his discretion, and in accordance with the applicable statutes and regulations.

Accordingly, the judgment of the district court is

AFFIRMED.

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1530

FAYETTEVILLE AREA CHAMBER OF COMMERCE, *Plaintiff,*
INTERSTATE 95 COMMITTEE, *Plaintiff-Appellant,*

v.

JOHN A. VOLPE, Individually and as Secretary of Transportation, F. C. TURNER, Individually and as Federal Highway Administrator, and RALPH R. BARTELSMEYER, Individually and as Director of Public Roads, and State Highway Commission, *Appellees.*

Appeal from the United States District Court for the Eastern District of North Carolina.

This cause came on to be heard on the record from the United States District Court for the Eastern District of North Carolina, and was argued by counsel.

On consideration thereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

Filed May 5, 1975

/s/ WILLIAM K. SLATE, II
William K. Slate, II
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

Civil No. 933

FAYETTEVILLE AREA CHAMBER OF COMMERCE and INTERSTATE 95 COMMITTEE, *Plaintiffs*

vs.

JOHN A. VOLPE, Individually and as Secretary of Transportation; F. C. TURNER, Individually and as Federal Highway Administrator; and RALPH R. BARTELSMEYER, Individually and as Director of Public Roads; and STATE HIGHWAY COMMISSION, *Defendants*

Memorandum of Decision

In this action the plaintiffs, Fayetteville Area Chamber of Commerce and the Interstate 95 Committee, seek judicial review of the selection and approval of the defendants of a by-pass location of Federal Interstate Highway Route 95 around Fayetteville, North Carolina. Jurisdiction is laid under Section 10 of the Administrative Procedure Act, 5 U.S.C. § 702. In their complaint filed almost six years ago plaintiffs alleged that the approval by the defendants of a by-pass location rather than aligning the proposed new interstate highway along existing U. S. Highway 301 thus bringing it within the eastern city limits of Fayetteville was arbitrary, capricious and otherwise not in accordance with law. This court, following what is perceived to be the standard for judicial review in such cases as outlined in *Citizens to Preserve Overton Park, Inc.* v. *Volep,* 401 U.S. 402 (1971), conducted a "thorough, probing, in-depth review" of the administrative record submitted by the defendants and concluded that the action of the defendants

in approving the by-pass location and rejecting the proposal of the plaintiffs was not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, and the motion of defendants for summary judgment was therefore allowed.

On appeal to the Court of Appeals for the Fourth Circuit this court's conclusion based on the administrative record as it then existed was approved, but in view of two developments in the law subsequent to the compilation of that record, the case was remanded to this court pending compliance by the Secretary of Transportation with the requirements of Section 102(c) of the National Environmental Policy Act, 42 U.S.C. § 4332(c), and Section 128 (a), as amended, of the Federal-Aid Highways Act, 23 U.S.C. § 128(a). Although enacted long after defendants' initial approval of the by-pass location, these statutes were held to apply retrospectively to an ongoing highway project in *Arlington Coalition on Transportation, et al.,* v. *Volpe,* 458 F.2d 1323 (4th Cir. 1972), if the project has not reached a stage of completion at which it would be economically feasible to alter or abandon the project's proposed location. This court was directed to retain jurisdiction "until such time as the Secretary satisfies [the] court that there has been full compliance with the requirements of Section 102(c)". The court was further directed to conduct "such further proceedings as may be necessary in light of the decision in *Arlington* and the views herein expressed".

The Secretary, apparently anticipating the Fourth Circuit's ruling in *Arlington* of the necessity of his compliance with NEPA, had already taken steps to have an Environmental Impact Statement (EIS) prepared prior to the remand of the case to this court by the Fourth Circuit, and following remand a final EIS was prepared, circulated and approved by all interested parties. Adhering to a time schedule established by this court, the North Carolina

State Highway Commission (now the Division of Highways, Department of Transportation and Highway Safety) conducted a further public hearing on July 16, 1973, for the purpose of complying with Section 128(a), as amended, of the Federal-Aid Highways Act. Thereafter the State authorities reaffirmed the by-pass location for I-95, and made a summary report to the United States Secretary of Transportation in compliance with the applicable regulations on October 5, 1973, requesting that the Federal Highway Administration reaffirm its approval of the by-pass location. On October 24, 1973, the division engineer for the Department of Transportation, Federal Highway Administration, wrote to the North Carolina State Highway Administrator, Division of Highways, as follows:

> "We have completed our review of the summary report transmitted with your letter dated October 5, 1973. We have previously reviewed the other documents submitted as required by PPM's 20-8 and 90-1 and now consider that the necessary requirements have been met.
>
> "We hereby reaffirm the corridor location approval originally given by Mr. F. C. Turner on March 21, 1968, and approve the design of the project."

Following this second approval of the I-95 by-pass location the defendants renewed their motion for summary judgment to which the plaintiffs filed responses bringing under attack the attempted compliance by defendants with the requirements of NEPA and Section 128(a) of the Federal-Aid Highways Act. It is this motion which is now before the court for decision.

Although the matter has been argued at length on two occasions by able counsel for plaintiffs and defendants, counsel are still not able to agree upon the appropriate standard of judicial review which should be employed in cases such as this. With due deference this court is constrained to observe that the decisions to which it has been obliged to refer for guidance have not always been models of clarity. In the following discussion of the actions taken by the defendants to comply with the Fourth Circuit's directives on remand this court has concluded to examine the actions of the defendants in the light of all the standards of review of which it is aware. Accordingly, the court has made a "thorough, probing, in-depth review" of the additions made to the administrative record submitted by the defendants subsequent to remand as required by *Overton Park,* supra; it has reviewed the agency decisions on the merits to determine if they are in accord with NEPA as required by *Conservation Council of North Carolina* v. *Froehlke,* 473 F.2d 664 (4th Cir. 1973),[1] and *Appalachian Power Company, et al.,* v. *Environmental Protection Agency,* 477 F.2d 495 (4th Cir. 1973); and has undertaken to determine if the Secretary of Transportation inadequately explained his decision, all with the view to determining whether the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law". *Camp* v. *Pitts,* 411 U.S. 138, 142 (1973).

The Environmental Impact Statement

The plaintiffs have mounted a two-pronged attack on the EIS contending first that the Secretary exceeded his statutory authority by permitting the EIS to be prepared by the North Carolina Transportation Department rather than preparing it himself and second, that the EIS as prepared does not adequately comply with the requirement of Sec-

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[1] To what extent, if at all, this decision was rendered "inoperative" by *Camp* v. *Pitts,* 411 U.S. 138 (1973), is unclear. See *Conservation Council of North Carolina* v. *Froehlke,* No. 73-8095 decided November 20, 1973. That there is disagreement among the circuits as to the appropriate standard of review is illustrated by *National Helium Corporation* v. *Morton,* 486 F.2d 995, 1006 (10th Cir. 1973).

tion 102(2)(c)(iii) of NEPA that "alternatives to the proposed action" be included therein.

In support of their first point plaintiffs have cited and relied on *Greene County Planning Board* v. *Federal Power Commission,* 455 F.2d 412 (2nd Cir. 1972), *cert. denied,* 409 U.S. 849, and *Conservation Society of Southern Vermont* v. *Secretary of Transportation,* 362 F.Supp. 627 (D.Vt. 1973). With these two exceptions all of the cases dealing with the delegation of EIS preparation to an outside agency have permitted such delegation where the federal agency significantly participated in the preparation of the EIS. See, for instance, *Finish Allatoona's Interstate Right, Inc.,* v. *Volpe,* 355 F.Supp. 933 (N.D. Ga. 1973), aff'd., — F.2d — (5th Cir. 1973), and *Life of the Land* v. *Brinegar,* 485 F.2d 460 (9th Cir. 1973). In *Life of the Land* it appeared that the EIS was prepared by a private engineering consulting firm which had a financial interest in an affirmative decision on the proposed project, but in view of evidence of significant participation by the federal agency in the preparation of the EIS, delegation of the EIS preparation was held not to be improper or illegal. The *Greene County* and *Conservation Society of Southern Vermont* cases were distinguished on the grounds that in those cases the federal agency had "abdicate[d] a significant part of its responsibility" to another organization.[2]

In the case at bar the record indicates good faith participation by responsible federal officials in the preparation of two draft environmental statements and the final EIS. More importantly, an examination of these quite bulky documents has convinced the court that not only were all the

[2] It should be noted that Vermont District Court in *Conservation Society* found the EIS prepared by the Vermont Highway Department "in substance not to have been biased" and that it demonstrated (with one exception not pertinent here) "good faith consideration of the environmental values involved . . ." 362 F.Supp. 627, 633.

required procedural steps followed by the state and federal agencies but that both the state and federal defendants considered all relevant factors in reaching decision and that the decision did not represent "a clear error of judgment". A full articulation of the reasoning of the state and federal agencies is contained in the EIS in connection with its treatment of each of the five requirements of NEPA.[3]

The court is likewise not impressed with plaintiffs' argument that the EIS did not adequately cover "alternatives to the proposed action" as required by Section 102(2)(c)(iii) of NEPA. The basis for the argument is the assertion in plaintiffs' supplemental answer to defendants' motion for summary judgment that a plan for "an intermediate location" was submitted to the State Highway authorities "by a respected, technically-qualified and long-time resident of Fayeteville, who was not aligned with the plaintiffs in this case" and that although this alternative plan was considered by the state before the United States Department of Transporation gave is approval, "neither the report required under 23 U.S.C. § 128(b) nor the Environmental Impact Statement made any mention of it".

That this alternative proposal was indeed considered by the North Carolina Division of Highways is established by a detailed memorandum from its Planning and Research

[3] 42 U.S.C. § 4332(2)(c) provides that the EIS must include:

"(i) the environmental impact of the proposed action,

"(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

"(iii) alternatives to the proposed action,

"(iv) the relationship between local short-term uses of man's environmental and the maintenance and enhancement of long-term productivity, and

"(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

Branch to the State Highway Administrator dated September 21, 1973[4] attached as an exhibit to plaintiffs' supplemental answer. In this memo the proposed intermediate location was compared in detail with the by-pass location approved by the defendants and the U. S. 301 alignment proposal favored by the plaintiffs. As against the by-pass location it was found to have one advantage (reducing the effect on wildlife) and thirteen disadvantages many of which were environmentally related. As against the U.S. 301 alternative it was found to have six advantages and two disadvantages, one of each being environmentally related.

It is perfectly obvious that regardless of when this alternative proposal was first received and considered by the state officials, its inclusion in the EIS would have served only to increase the size of that already voluminous document and that it could in no way have altered the conclusions reached therein on alternatives. The same is true of the failure to mention the "intermediate location" proposal in the report made by the state under 23 U.S.C. § 128(b). As was said in *Life of the Land, supra,* 485 F.2d 460, 472,

> "NEPA's 'alternatives" discussion is subject to a construction of reasonableness. *N.R.D.C., Inc.* v. *Morton, supra,* 458 F.2d at 834. Certainly, the statute should not be employed as a crutch for chronic fault-finding. Accordingly, there is no need for an EIS to consider an alternative whose effect cannot be reasonably ascertained, and whose implementation is deemed remote and speculative."

[4] The record does not indicate when this alternative plan was received by the Division of Highways. On oral argument counsel for this defendant indicated that it was not available at the time of the public hearing on July 16, 1973, while counsel for the plaintiffs stated that he was in position to show that it was received by the state officials prior to that date. In the view the court takes of the matter, this is immaterial.

Compliance With 23 U.S.C. § 128(a) As Amended

The second purpose to be served by the Fourth Circuit's remand of the case to this court was to permit compliance with 23 U.S.C. § 128(a) relating to public hearings with respect to the route of a proposed federal-aid highway. At the time of the first public hearing in this case in 1966 Section 128(a) required only that information be amassed at the hearing to aid in the consideration of the economic effects of the locations under consideration. Effective August 23, 1968, which was after the institution of this action, Section 128(a) was amended to provide that additional information must be sought at such hearings to aid in the consideration of the social effects of the proposed location, its impact on the environment, and its consistency with the particular community's urban planning objectives and goals. In order to comply with these new requirements the state authorities after due advertisement conducted a further lengthy public hearing on July 16, 1973, at which the plaintiffs were represented by counsel and offered expert testimony. A lengthy transcript of that hearing has been filed as part of the administrative record in this court and has been reviewed.

Despite the claim of plaintiffs in their brief that the record in this case "is little short of a complete disaster", the court finds that it is on the contrary quite complete and by no means "a disaster". It will be recalled that the Fourth Circuit has already found the record in this case to contain ample evidence that the Secretary gave adequate consideration to local needs, the possible use of existing Highway 301 as an alternate route and the possible economic impact on the local economy resulting from the by-pass location of I-95. This court now finds that the July 16, 1973 hearing fully covered the social effects of the proposed by-pass location, its impact on the environment and its consistency with the community's urban planning objectives and goals.[5]

[5] Also covered at this hearing was the matter of the design of the proposed location as required by the Department of Transporta-

Central to the plaintiffs' argument as to the alleged inadequacy of the record is the contention that it is "devoid of any evidence of how the federal officials considered and resolved any of the many controversial issues." The court is of the opinion, however, that the record fully discloses the factors which were considered by the federal officials, and even if it can be said that they did not explain in detail the reasons for their decision approving the actions of the state officials following remand, the determinative reason for the action taken is perfectly apparent: In addition to the reasons fully explicated for his initial approval of the by-pass location in 1968 (which counsel for plaintiffs on oral argument at the most recent hearing praised for their comprehensiveness) the Secretary (acting through his subordinates) has now found the EIS and the record of the second public hearing to be fully supportive of the initial decision. That brevity in the expression of administrative decision is not fatal is illustrated by *Camp* v. *Pitts,* supra at page 143, and that inquiry into the mental processes of administrative decision-makers is usually to be avoided is another teaching of *Overton Park,* supra.

The conclusion is that the Secretary's decision in this case is fully sustainable on the entire administrative record as it now exists, and it follows that defendants are again entitled to allowance of their motion for summary judgment. Judgment will be entered accordingly.

/s/ F. T. DUPREE, JR.
F. T. Dupree, Jr.
United States District Judge

February 1, 1974.

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tion's policy and procedure memorandum 20-8. Plaintiffs have raised no question as to the adequacy of the hearing for this purpose.

APPENDIX D

1. Section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. 4332, provides in relevant part:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—
>
> > (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
> >
> > (i) the environmental impact of the proposed action,
> >
> > (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> >
> > (iii) alternatives to the proposed action,
> >
> > (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> >
> > (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
>
> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and en-

force environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) study, develop and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

2. The Federal-Aid Highways Act, 23 U.S.C. 128(a) provides as follows:

Any State highway department which submits plans for a Federal-aid highway project involving the bypassing of, or going through, any city, town, or village, either incorporated or unincorporated, shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community. Any State highway department which submits plans for an Interstate System project shall certify to the Secretary that it has had public hearings at a convenient location, or has afforded the opportunity for such hearings, for the purpose of enabling persons in rural areas through or contiguous to whose property the highway will pass to express any objections they may have to the proposed location of such highway. Such certification shall be accompanied by a report which indicates the consideration given to the economic, social, environmental, and other effects of the plan or highway location or design and various alternatives which were raised during the hearing or which were otherwise considered.

APPENDIX E

STATE OF NORTH CAROLINA
DEPARTMENT OF TRANSPORTATION AND HIGHWAY SAFETY
RALEIGH 27611

Division of Highways

James E. Holshore, Jr.
Governor
Bruce A. Lentz
Secretary

September 21, 1973

MEMORANDUM To: Mr. Billy Rose

FROM: Planning and Research Branch

SUBJECT: I-95 Fayetteville, "Intermediate Location"

As per your direction, this Branch in cooperation with the Roadway Design Unit has investigated the feasibility of the above subject. The accompanying aerial mosaic, showing approximate centerline and right of way requirements, was prepared and utilized in this investigation. The corridor shown on the map is essentially the same corridor which you submitted on the blue print aerial mosaic on September 5, 1973.

The project proposed for this corridor was divided into three parts and is described as follows:

Section 1—from a point on existing I-95 near Roslin, along existing US 301 to a point near SR 2219, a distance of 4.6 miles (not shown on aerial mosaic).

Section 2—the relocation portion from US 301 near SR 2219, northeasterly to a point on existing US 301 near SR 1725, a distance of 9.7 miles (shown on aerial mosaic).

Section 3—Safety project portion from US 301 near SR 1725 north along US 301 & I-95 to a point on existing I-95 near Eastover, a distance of 2.8 miles (not shown on aerial mosaic).

The design proposed for Section 1 would be as proposed under Scheme I of the US 301 Alternative, i.e. a 70 MPH design speed, 68 ft. median, 6 lanes with 10 ft. paved outside shoulder and 4 ft. paved inside shoulder, and frontage roads on both sides. Diamond interchanges would be constructed at SR 2242 (near Roslin) and NC 59. The existing US 301 Flyover would be removed. The interchange at SR 1363 included in the US 301 Alternative would not be included under the "intermediate" location due to the proximity to the flyover where the relocation begins.

The design for Section 2 (Relocation) consists of 4 lanes with 10 ft. paved outside shoulders and 4 ft. paved inside shoulders and a 68 foot median. Frontage roads are not proposed. Freeway to freeway interchanges are proposed at Airport Road-Future Owen Drive, NC 87-CBD Loop and NC 24 Relocated. Directional flyover interchanges are proposed at US 301 on the north and south ends of the relocated section. Separations without access are proposed at Airport Connector (SR 2282), Wilkes Road (SR 2210), South King Street, Deep Creek Road, NC 53-210, NC 53-210, NC 24 (existing), Plymouth Street and Dunn Road (SR 1833). Also, structures will be required to carry the project over the Cape Fear Railroad, Cape Fear River, Seaboard Coast Line Railroad and Locke's Creek.

The design on Section 3 would be the same as proposed under the US 301 Alternative, consisting of a safety project. This would upgrade the existing four lane freeway by adding 10 ft. paved outside shoulders and 4 ft. paved inside shoulders, a 30 ft. clear area, breakaway signs, etc. A project of this type is deemed necessary by FHWA regardless of the location of I-95. Therefore, FHWA would not allow its cost to be included in comparisons of alternatives.

Preliminary cost estimates and number of relocation based on a field count for sections 1 and 2 are as follows:

Cost		Relocations	
Construction		Residential	464
Roadway	$40,000,000	Businesses	45
Structures	$14,000,000	Manufacturing Plants	2
Right-of-Way	$16,000,000	Non Profit	
Lighting	$ 2,000,000	Organizations	9
Total	$72,000,000	Total	520

This corridor location has certain advantages and disadvantages compared with the US 301 location and the bypass location.

"Intermediate" vs. "Bypass"

Advantages of "Intermediate" Alignment

(1) Does not take as much rural land or divide large wooded tracts suitable for wildlife habitat.

Disadvantages of "Intermediate" Alignment

(1) Takes considerably more residences, businesses and nonprofit organizations

(2) Cost considerably more to construct lesser length of highway

(3) Requires relocation of approximately 75 graves from McFaden Cemetery and Rockfish Memorial Park

(4) Maintenance of traffic would be more difficult (on Section 1 and Section 3).

(5) It is not in conformance with Cumberland County planning efforts.

(6) Does not meet national noise standards of PPM 90-2.

(7) Divides and destroys integrity of minority neighborhood near Old Wilmington Road.

(8) Divides and destroys integrity of Vineland Park subdivision near SR 2291.

(9) Requires complicated interchange design at Airport Road-Future Owen Drive and NC 87-Future CBD Loop due to proximity to US 301. US 301 will have to be separated without access (to Future Owen Drive and future CBD Loop) thereby, restricting local traffic service.

(10) Requires extensive fill and channel change in the Locke's Creek flood plain between NC 24 and Dunn Road (SR 1838).

(11) Takes part of riverport terminal and restricts future expansion of facilities to the north.

(12) Greater impact on Fayetteville and Cumberland County tax base.

(13) Greater effect on social institutions in that it would take 4 churches, boy scout and cub scout facilities, a social club and portion of two cemeterys.

"Intermediate" vs. "US 301 Alternative"

Advantages of "Intermediate" Alignment

(1) Cost less to construct longer length of roadway.

(2) Requires less time to construct (estimated 4 years for right of way acquisition and 4 years for construction).

(3) Eliminates section 4(f) consideration of Pope Park.

(4) Eliminates complicated interchange at Gillespie Street-W. Hudson Street.

(6) Considerably reduces traffic handling problem during construction.

Disadvantages of "Intermediate" Alignment

(1) Requires separate airport connector from US 301 due to interchange at Airport Road-Future Owen Drive.

(2) Divides and destroys integrity of Vineland Park and minority neighborhood near Old Wilmington Road.

Consideration and approval of an intermediate corridor location would require the following time schedule to reach the point where the "bypass" corridor stands at present.

July 1, 1974	Preliminary design complete
January 1, 1975	Draft EIS complete
February 1, 1975	Corridor public hearing held
April 1, 1975	Final EIS complete
July 1, 1975	Design public hearing held
September 1, 1975	Design approval from FHWA
January 1, 1977	Field surveys complete
November 1, 1977	Right of way plans complete

This schedule was arrived at after consultation with Mr. R. W. McGowan. He stresses that it is the very minimum amount of time required for each phase and would require a first order priority being assigned all phases of the project.

In summary, the "intermediate" location has some advantages over the US 301 alternative; however, it also has disadvantages. When compared to the "bypass" location it only has one advantage, reducing the effect on wildlife, against many disadvantages. Therefore, considering the above and the time delay in advancing the "intermediate" location to the position of the "bypass," it is *not* recommended that further consideration by given to this alternative.

FRP/gs

cc: Mr. R. W. McGowan
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Supreme Court, U. S.
FILED
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No. 75-180

In the Supreme Court of the United States

OCTOBER TERM, 1975

INTERSTATE 95 COMMITTEE, PETITIONER

v.

WILLIAM T. COLEMAN, JR.,
SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The September 17, 1971, opinion of the district court is not reported. The opinion of the court of appeals affirming in part and remanding in part is reported at 463 F.2d 402. The opinion of the district court on remand (Pet. App. C, 14a-22a) is reported at 386 F.Supp. 572. The opinion of the

court of appeals following remand (Pet. App. A, 1a-12a) is reported at 515 F.2d 1021.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, 13a) was entered on May 5, 1975. The petition for a writ of certiorari was filed on August 1, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the preparation of an environmental impact statement by state officials in regard to a federally-funded highway project violates Section 102 (2)(C) of the National Environmental Policy Act of 1969, when the responsible federal official supervised the preparation of the statement and adopted it as his own.

2. Whether the State Highway Administration's failure to advise the Secretary of Transportation of its consideration and rejection of an alternative route, suggested to the state officials after public hearings had ended and after they had completed preparation of an environmental impactment statement, rendered the Secretary's approval of the final environmental impact statement invalid.

STATUTES INVOLVED

The relevant portions of the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C.

4321, *et seq.*, and of 23 U.S.C. 101, *et seq.*, are set forth at Pet. App. D, 23a-24a. The Act of August 9, 1975, Pub. L. 94-83, 89 Stat. 424, amending Section 102(2) of the National Environmental Policy Act, is reproduced as an appendix to this brief.

STATEMENT

This case concerns the location of Interstate Highway 95 ("I-95") at the city of Fayetteville, North Carolina. In March 1968, the Secretary of Transportation approved a by-pass location for the Fayetteville segment of I-95, approximately five miles east of the city, rather than improving U.S. Highway 301, which goes through the city. Petitioner, an association of businessmen with establishments on U.S. Highway 301 (Pet. 4), and the Fayetteville Area Chamber of Commerce[1] sought to have the Secretary's approval set aside as being contrary to the intent of 23 U.S.C. 101(b), as amended, to utilize existing highways where feasible in order that local needs may be given equal consideration with the needs of interstate commerce.[2] Upon a review of the adminis-

---

[1] The Chamber of Commerce, originally a co-plaintiff in this action, did not join in petitioner's appeal from the district court's decision on remand and is not a petitioner before this Court.

[2] The action was originally filed in the United States District Court for the District of Columbia and was later transferred to the Eastern District of North Carolina, in order that the State of North Carolina could be joined as a defendant.

trative record, the district court concluded that the respondents had fully complied with 23 U.S.C. 101(b) and granted respondents' motion for summary judgment.

Petitioner and the Chamber of Commerce appealed the decision and, in addition to alleging noncompliance with 23 U.S.C. 101(b), argued for the first time that the respondents were required to comply with the then recently-enacted provisions of the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U.S.C. 4321, *et seq.*, and the 1968 amendments to 23 U.S.C. 128(a).[3]

The court of appeals (463 F. 2d 402) affirmed the district court's dismissal of petitioner's original claims under 23 U.S.C. 101(b) and remanded the case for consideration by the district court of petitioner's newly-raised claims in light of the decision of the court of appeals in *Arlington Coalition on Transportation* v. *Volpe*, 458 F. 2d 1323 (C.A. 4). In *Arlington Coalition*, the court held that NEPA

[3] Prior to its amendment in 1968, Section 128(a) required the state highway officials to hold a public hearing at which the focus of concern was the *economic* effect of the proposed location. The 1968 amendment requires consideration of the social and environmental effects as well. 82 Stat. 828. In 1970, Section 128(a) was amended again to require that any state certifying that it has held the required hearings must submit with its certification "a report which indicates the consideration given to the economic, social, environmental, and other effects of the plan or highway location or design and various alternatives which were raised during the hearing or which were otherwise considered." 84 Stat. 1734.

and the amended provisions of Section 128(a) might apply to an ongoing highway project, even though the project was begun before the effective date of these statutes.

In the meantime, the state officials with the cooperation and participation of the Federal Highway Administration, began preparation of an environmental impact statement (EIS), as required by Section 102(2)(C) of NEPA (42 U.S.C. 4332(2)(C); see Pet. App. D, 23a-24a). After several draft impact statements were circulated for comment, and after review and approval by the Department of Transportation, the Secretary released the final environmental impact statement for the Fayetteville segment of I-95 on September 17, 1973. As possible alternatives to the proposed by-pass location, the EIS considered the location favored by petitioner along Highway 301 and the alternative of doing nothing. The final EIS also incorporated the testimony and submissions from a combined design and location hearing that had been held on July 16, 1973, pursuant to the remand order of the court of appeals (Pet. App. A, 3a-4a).

On October 20, 1973, the Secretary again approved the by-pass location for the Fayetteville segment of I-95 (Pet. App. A, 4a). The respondents then moved for summary judgment in the district court. The court, after holding two hearings and reviewing the entire administrative record, rejected petitioner's challenges to the Secretary's action, finding (1) that the

EIS was properly prepared by the North Carolina Department of Highways under the supervision and guidance of the Federal Highway Administration, (2) that alternatives to the proposed action were adequately considered, and (3) that the July 16, 1973, public hearing fully complied with the requirements of 23 U.S.C. 128(a), as amended (Pet. App. C, 14a-22a).

Upon petitioner's appeal, the court of appeals affirmed the district court in all respects (Pet. App. A, 1a-12a). Finding ample participation by the federal officials in the preparation of the draft and final impact statements, the court upheld the joint state-federal effort (Pet. App. A, 3a-8a). Regarding the duty to consider alternatives, the court held that the federal officials' obligation is subject to a construction of reasonableness and found that all reasonable alternatives had in fact been considered (*id.*, at 9a-12a).

ARGUMENT

1. The first question presented by petitioner (Pet. 2-3) has been rendered moot by the enactment on August 9, 1975, of Pub. L. 94-83, 89 Stat. 424.[4] Petitioner sought to challenge the Federal Highway Administration's practice of allowing state highway departments, with federal guidance and participation, to prepare the environmental impact statements required by Section 102(2)(C) of NEPA. However, Pub. L. 94-83 amends Section 102(2) to allow

[4] The statute is reproduced as an appendix to this brief.

such state participation under the circumstances of this case and renders moot any division in the circuits that may have previously existed on this point.[5] The amendment is retroactive to January 1, 1970, the effective date of NEPA. The Fourth Circuit's decision is in harmony with the amendment[6] and leaves nothing for this Court to review on this issue.

2. Petitioner contends (Pet. 12-15) that the State Highway Department's failure to advise the federal officials that an alternative location, midway between the by-pass location and Highway 301, had been considered and rejected, rendered the Secretary's decision defective. However, as both the district court and the court of appeals recognized, the federal officials' obligation to consider alternatives, both under

[5] The amendment requires federal guidance, participation and independent evaluation of state-prepared impact statements. A review of the Fourth Circuit's decision demonstrates that it applied essentially the same criteria before approving the delegation in this case. See Pet. App. A, 5a-9a.

[6] The amendment was passed partially in response to the Second Circuit's decision in *Conservation Society of Southern Vermont, Inc.* v. *Secretary of Transportation*, 508 F. 2d 927, in which that court held participation in the preparation of an impact statement by state officials impermissible (H.R. Conf. Rep. No. 94-388, 94th Cong., 1st Sess (1975); 121 Cong. Rec. H7739-H7750 (daily ed., July 29, 1975). The federal defendants in that case filed a petition for a writ of certiorari on May 9, 1975 (*Coleman* v. *Conservation Society of Southern Vermont, Inc.*, No. 74-1413). In view of the recent amendment, the government has requested this Court to reverse the Second Circuit's decision or, alternatively, to remand the case for reconsideration in light of Pub. L. 94-83 (and, on another point, this Court's intervening decision in *Aberdeen and Rockfish R.R.* v. *SCRAP*, No. 73-1966, decided June 24, 1974).

NEPA and the Federal-Aid Highway Act, is subject to a construction of reasonableness. See, *e.g.*, *Life of the Land* v. *Brinegar*, 485 F.2d 460, 472 (C.A. 9); *Natural Resources Defense Council* v. *Morton*, 458 F.2d 827 (C.A. D.C.). Thus, while an infinite number of alternatives are possible for virtually every major federal action, only "reasonable" alternatives need be considered.

The facts surrounding the state officials' discovery of the third alternative are thus important. As the court of appeals stated (Pet. App. A, 9a), some time after the July 16, 1973, public hearing, a "respected, technically qualified, and long-time resident of Fayetteville" submitted this alternative to the State Highway Department. While the exact date of the submission does not appear in the record, it is certain that the suggestion was not raised at the July 16, 1973, public hearing and it appears likely that the suggestion was not proffered until early September 1973 (see Pet. App. E, 25a). Despite the lateness of the suggestion,[7] the State Highway Department did consider this alternative and concluded that it compared unfavorably with the recommended by-pass location (Pet. App. E, 25a-29a). Moreover, the state officials concluded that adoption of this alternative would add another four years of delay to a project that had been planned since 1961 and had already

[7] The State Highway Department had submitted the environmental impact statement to the Federal Highway Administration for federal review and approval on August 24, 1973 (Pet. App. A, 4a).

been subjected to considerable delay. Accordingly, the state officials determined that it was unnecessary to supplement the final EIS or their submission to the federal officials in order to include a formal discussion of the late-presented alternative (*ibid.*).

In approving the environmental impact statement, the courts below properly applied the "rule of reason" in light of these facts. As the court of appeals recognized (Pet. App. A, 11a), "there must be an end to the process somewhere or no federal-aid highway would ever be built. So long as there are unexplored and undiscussed alternatives that inventive minds can suggest, without a rule of reason, it will be technically impossible to prepare a literally correct environmental impact statement and literally impossible for a state highway department to report, in compliance with § 128(a), the final decision on the route of a federal highway to the federal authorities." [8]

[8] Petitioner suggests (Pet. 12-15) that the court's application of the standard of reasonableness is not in accord with its application in some other circuits, but the application of such a standard must necessarily vary with the factual setting. Petitioner does not point to any decision, and we know of none, that would support the proposition that there is a conflict among the circuits on this issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1975.

APPENDIX

Public Law 94-83
94th Congress, H.R. 3130
August 9, 1975
89 Stat. 424

AN ACT

To amend the National Environmental Policy Act of 1969 in order to clarify the procedures therein with respect to the preparation of environmental impact statements.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 102(2) of the National Environmental Policy Act of 1969 (83 Stat. 852) is amended by redesignating subparagraphs (D), (E), (F), (G), and (H) as subparagraphs (E), (F), (G), (H), and (I), respectively; and by adding immediately after subparagraph (C) the following new subparagraph:

> "(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:
>
> "(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,
>
> "(ii) the responsible Federal official furnishes guidance and participates in such preparation,

"(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

"(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction."

Approved August 9, 1975.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No 94-144 (Comm. on Merchant Marine and Fisheries) and No. 94-388 (Comm. of Conference).
SENATE REPORTS: No. 94-152 (Comm. on Interior and Insular Affairs) and 94-331 (Comm. of Conference).
CONGRESSIONAL RECORD, Vol. 121 (1975):

April 21, considered and passed House.
May 22, considered and passed Senate, amended.
July 25, Senate agreed to conference report.
July 29, House agreed to conference report.

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WILLIAM T. COLEMAN, JR., Secretary of Transportation, *et al., Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY MEMORANDUM

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---

PETITIONER'S REPLY MEMORANDUM

Petitioner Interstate 95 Committee replies as follows to the federal respondents' brief in opposition to certiorari:

1. On pages 6-7 of their brief in opposition, the federal respondents assert that our first certiorari question is moot by reason of the enactment of Pub. L. 94-83 which is retroactive all the way back to the Janu-

ary 1, 1970 effective date of NEPA.[1] They therefore urge that certiorari on this question be denied here. They also note in this connection that on the *identical* question which they themselves raised in the pending petition for certiorari in No. 74-1413, they have requested this Court to reverse the Second Circuit *or, alternatively, to remand the case for reconsideration.*

The alternative relief requested by the respondents in No. 74-1413 moves us to urge serious caution in the disposition of an identical question in the two pending petitions if inconsistency with Congressional intent is to be avoided. The plain fact of the matter is that upon the record both cases are indistinguishable as to the quality and quantity of federal involvement in the preparation of the environmental statements. They are representative of the great mass of highway project cases in which the Department of Transportation with its admittedly limited qualified personnel and resources largely left the all-important show of compliance with NEPA to state highway commissions.[2] That the Congress frowned upon, and had no intention to legitimatize such conduct in Pub. L. 94-83, is further

[1] While our petition was filed *prior* to the enactment of Pub. L. 94-83, we noted on p. 8 thereof that legislation that might affect this question was pending in the Congress and that we would further advise this Court as appropriate.

[2] "Available evidence, including testimony by the prior Secretary of Transportation, John Volpe, indicates that state highway commissions do not affirmatively seek a neutral and unbiased judgment of the environmental aspects of a proposed project. These bodies tend to view environmental impact statements as mere procedural paperwork which will justify prior decisions made on the basis of traditional engineering and cost-analysis concepts." 58 Iowa L. Rev. 1268, 1270 (1973).

clearly revealed in the legislative history of that Act (see particularly pp. 10-11 of Report No. 94-152, Comm. on Interior and Insular Affairs, 94th Cong., 2d Sess.). In view of the dismal history of federal participation in NEPA statements in highway project cases (many of which are still languishing in the lower courts), and for the sake of giving proper scope to this new legislation and the promotion of uniformity in its application, we urge the Court to grant certiorari in both our case and in No. 74-1413 and to consolidate them for argument.

2. The respondents do not suggest that Pub. L. 94-83 applies to the second question in our petition for certiorari, and, of course, it does not apply.

On page 8 of their brief, the respondents seem to suggest that it is of critical importance that "it appears likely" that the submission of the alternative proposal was made a little after the State Highway Department submitted the environmental impact statement for federal approval. First of all, we submit that what is of critical importance is not that; but rather the fact, as we have shown on pages 13-14 of our Petition, that there was ample time for the state to inform the federal authorities *before the approval* of either the environmental statement or the entire project. Secondly, it must have slipped the respondents' attention that our offer of proof in the district court that the alternative proposal was submitted even *before the public hearing* was disallowed (Pet. p. 13; Pet. App. C, p. 20a, note 4).

In note 8 of their brief, the respondents answer our claim of conflict in the Circuits with nothing more than the pious and general assertion that "the application of such a standard must necessarily vary with the

factual setting." We assure the Court that it was with due respect to this principle that we cited the cases on pages 14-15 of our Petition, particularly *I-291 Why? Association* v. *Burns.*

CONCLUSION

We believe that certiorari should be granted as to both questions raised in our Petition. In the alternative, we request certiorari on the second question concerning the state's failure to report its consideration of the intermediate route.

Respectfully submitted,

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